No. 76-494

In the Supreme Court of the United States

OCTOBER TERM, 1976

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCALS 542, 542-A AND 542-B, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A35-A55) is reported at 532 F. 2d 902. The decision and order of the National Labor Relations Board (Pet. App. A4-A34) are reported at 216 N.L.R.B. 408.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1976 (Pet. App. A56-A57). On July 30, 1976, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including October 7, 1976. The petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that petitioners violated Section 8(b)(4)(ii)(A) of the National Labor Relations Act by threatening, coercing and restraining York County Bridge, Inc., with an object of forcing or requiring it to enter into a secondary boycott agreement prohibited by Section 8(e) of the Act.

2. Whether the Board properly found that petitioners conditioned bargaining upon agreement with respect to a non-mandatory bargaining subject, in violation of Section 8(b)(3) of the Act.

3. Whether the case should have been dismissed as moot.

STATEMENT

At the time this case arose, petitioners ("Local 542") were parties to a collective bargaining contract with York County Bridge, Inc., a subcontracting firm engaged principally in pile-driving and bridge construction (Pet. App. A12-A13). York is a wholly-owned subsidiary of G.A. and F.C. Wagman, Inc., which engages in the same type of work as York (Pet. App. A12). Wagman's employees have been represented for many years by District 50, Allied Technical and Construction Workers (Pet. App. A37).[1] In order to secure work on jobs where all subcontractors were required to have contracts with petitioners or other AFL-CIO affiliated unions,[2]

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[1]Local 542 considers District 50 to be a "rival union" because District 50 members perform construction work within Local 542's jurisdiction. For the same reason, Local 542 considers Wagman to be "non-union," notwithstanding its relationship with District 50 (Pet. App. A11).

[2]Prior to the hearing in this case, District 50 was not affiliated with the AFL-CIO. District 50 merged thereafter with the United Steelworkers of America, AFL-CIO (see Pet. App. A37).

Wagman became a "dual company" in 1960;[3] it created York, a wholly-owned subsidiary, to bid on and perform jobs restricted to contractors having an agreement with Local 542 or other AFL-CIO affiliates (Pet. App. A11-A12).

From 1967 until 1971, York belonged to the Contractors Association of Eastern Pennsylvania ("CAEP"), which bargained on behalf of its members with Local 542 (Pet. App. A12-A13). When the existing agreement was about to expire in 1971, Local 542 determined to do something about the "dual company" situation (Pet. App. A-10). First, it informed CAEP that it wanted to exclude York and several similar companies from negotiations over a new contract; it also informed York that it wanted to bargain with it separately over a new contract (Pet. App. A13, A22). Second, Local 542 insisted, in its negotiations with the multi-employer group, on new provisions to alleviate the "dual-company" problem.[4] After a three-month strike

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[3]A "dual" or "double-breasted" construction firm consists of two component companies, one of which has a contract with an AFL-CIO union. The other component company may be non-union or, as here, have a contract with a union not affiliated with the AFL-CIO. The company that has the contract with an AFL-CIO union bids on construction projects where the general contractor is required to subcontract only to firms having agreements with an AFL-CIO affiliated union; the other component bids on other projects.

[4]The provisions proposed by petitioners to deal with the "dual company" problem were as follows (Pet. App. A11, n. 10):

> Section 11—Non-Union Equipment:
>
> (a) No operator shall be required to operate equipment belonging to a contractor or supplier with whom this Local Union is not in signed relations, provided, Union equipment is available in the locality. No party to this agreement shall rent or supply equipment unmanned to anyone doing construction

against the multi-employer group, the group agreed to a new contract containing the "dual company" provisions proposed by Local 542 (Pet. App. A13-A14, A22-A23).

Local 542 then turned to York and the other dual companies against which it was still on strike. At several bargaining sessions with York, Local 542 took the position that York would have to sign the previously-negotiated contract and bring Wagman under it before Local 542 would cease refusing to supply workers to York. York agreed to sign the contract but refused to phase out Wagman (Pet. App. A14-A15, A23).

Upon charges filed by York, the Board, by a vote of two to one, found that the dual company provisions sought to be included in the York agreement were unlawful under Section 8(e) of the Act, since they would have constituted, if accepted, an agreement to cease doing business with other persons in situations not involving work to be performed on the jobsite by employees represented by Local 542 (Pet. App. A24-A25). The Board further found that Local 542's threats and refusal to furnish workers to York were for an object of forcing or requiring York to agree to a contract with the dual company provisions, and that Local 542 thus had violated Section 8(b)(4)(ii)(A) of the Act (Pet. App. A27). Finally, the Board found that Local 542 had breached its statutory bargaining duty and hence violated Section 8(b)(3) of

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work covered by this agreement who is not in signed relations with this Union.

(b) No employee represented by this Union on construction work shall be required to operate equipment of or for any Employer who has any interest in a firm or company doing construction work within the jurisdiction of this Union and which is not in signed relations with this Union.

the Act by insisting, as a precondition for any contract, on provisions banned by Section 8(e) and on enlarging the bargaining unit so as to bring Wagman's operations under the contract (*ibid.*) The Board entered an appropriate remedial order (Pet. App. A28-A30).

A divided panel of the court of appeals upheld the Board's decision, and enforced its order. The court stated (Pet. App. A44-A47):

> Local 542 * * * contests the finding of coercion. It insists that, when York did not sever its ties with Wagman, the Union no longer had any desire to enter into a collective bargaining arrangement. However, based on substantial evidence in the record, the Board found to the contrary. It felt that the Local's course of conduct, both before and after the strike, including the meetings with York, established an intention to enter into a contract with the company, albeit on unacceptable terms. It is significant also that the union has never issued any formal and unequivocal disclaimer of a desire to represent York employees. Consequently, the Board had substantial support in the record for its finding that the union was attempting to coerce York into signing an illegal agreement in violation of §8(b)(4).
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> * * * *
>
> While parties are free to include voluntary subjects in their collective bargaining, those matters may not be made prerequisites to agreements on mandatory items. [Citations omitted.] The record here supports the Board's position that Local 542 wished to take over representation of Wagman employees from the United Steelworkers [see n. 2 *supra*]. The Operating Engineers were attempting, not to preserve their existing representation arrangement

but, rather, to expand the bargaining unit. Since an objective of this nature is not a mandatory bargaining matter, the union's insistence upon it constituted a failure to bargain in good faith. * * *

* * * *

The union responds that since York and Wagman were so closely interrelated, they were a single employer, and thus there was no violation of the duty to bargain. However, the Board did not find that York and Wagman constituted a single employer and, even if such a determination had been made, it could not have made bargaining on expansion of the unit a mandatory item. In the context of this case, the fact that only one employer might be involved does not alter the scope of the mandatory bargaining. * * *

The court also rejected Local 542's contention that the case was moot because the contract at issue had expired (Pet. App. A40):

> The exclusion of Section 11 from the master contract now in effect does not make the issue moot. Despite the union's concession, no agreement on the precise wording has been reached with York and, absent a judicial determination that the clauses under review are proscribed, the negotiators would remain uncertain.
>
> Moreover, the Board's decision was not limited to the legality of the contested contract language but necessarily included the refusal to bargain. An order directed toward that phase of an existing dispute cannot be considered moot.

ARGUMENT

1. Petitioners do not seriously contest the Board's finding, upheld by the court of appeals, that the dual company contract provisions violated Section 8(e) of the Act.[5] They also apparently concede that Section 8(b)(4)(ii)(A) of the Act prohibits union coercion of an employer to compel agreement on a contract provision prohibited by Section 8(e). Rather, petitioners contend (as did the dissenting member of the panel below) that the Board's finding of coercion is necessarily dependent upon a finding that York and Wagman are separate employers, and that, in the absence of such a finding, the Board's conclusion that they violated Section 8(b)(4)ii)(A) of the Act cannot stand (Pet. 10-13).

As already noted, however, petitioners struck both the multi-employer group and dual employers like York to obtain collective agreements containing the dual employer provisions they had proposed. They ended their strike against the multi-employer group only when the group surrendered on this point. Such pressure clearly constituted coercion under the Act, even if York and Wagman were a single employer.[6]

2. Petitioners' related contention (Pet. 8-10) that, if Wagman and York are a single employer, they could not have violated Section 8(b)(3) by pressuring York to bring the Wagman employees under their "standard agreement"

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[5]The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. App. A1-A3.

[6]Petitioners' assertion (Pet. 6) that they struck to secure additional commitments from York (*i.e.*, that it bring Wagman under the agreement) does not obviate the fact that it pressured York, no less than the other employers, to obtain a collective agreement containing the disputed dual employer provisions.

rests on a similar misconception. Even if York and Wagman were a single employer, it does not follow that petitioners' insistence on Wagman's employees being covered by the York contract related to a mandatory subject of bargaining. It is likely that the employees of York and Wagman would still constitute separate bargaining units. See *South Prairie Construction Co.* v. *Operating Engineers*, 425 U.S. 800. Although an employer and a union may agree voluntarily to merge separate bargaining units for purposes of contract negotiations, neither party is free to insist, as a condition to reaching agreement in one unit, that the negotiations also include other units or that the terms negotiated in the first unit be extended to the other units. *E.g.*, *National Labor Relations Board* v. *South Atlantic & Gulf Coast Longshoremen's Ass'n*, 443 F. 2d 218, 220 (C.A. 5); *Standard Oil Co.* v. *National Labor Relations Board*, 322 F. 2d 40, 45 (C.A. 6); see also *United Mine Workers* v. *Pennington*, 381 U.S. 657, 666-667.

Moreover, even if York and Wagman were a single employer, the disputed dual employer provisions violated Section 8(e) of the Act. By insisting that York enter into a contract with such illegal provisions, Local 542 further violated Section 8(b)(3) of the Act. See *National Labor Relations Board* v. *Amalgamated Lithographers*, 309 F. 2d 31, 42 (C.A. 9), certiorari denied, 372 U.S. 943.

3. Contrary to petitioners' contentions (Pet. 13-14, 16-19), the question whether a union properly may be ordered to bargain with and supply labor to an employer with whom it does not want to deal is not presented here. The Board found that Local 542 did want to deal with York, albeit on its own unlawful terms (Pet. App. A23-A24). The court of appeals concluded that that finding was supported by substantial evidence (Pet. App. A44-A45). The Board's order (Pet. App. A28-A29) does not require petitioners to sign a contract with York or to refer labor to it; it merely prohibits petitioners from conditioning referral or the execution of a contract upon York's acceptance of clauses

violating Section 8(e) or extending the agreement to employees in a unit currently represented by another labor organization.

4. Finally, no issue warranting certiorari is raised by petitioners' contention (Pet. 15-16) that the case should have been dismissed as moot. It is settled that the Board is entitled to enforcement of its orders even though the unfair labor practices precipitating the order have ceased. *E.g.*, *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U.S. 563, 567-568; *National Labor Relations Board* v. *Raytheon Co.*, 398 U.S. 25, 27. Moreover, as the court of appeals noted (Pet. App. A40), petitioners have not foresworn their unlawful activity directed at York.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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